Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1977

No. 77-933

LAWRENCE T. WESTERVELT,
Petitioner,

vs.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

THE PETITION DOES NOT PRESENT A FEDERAL QUESTION

Petitioner does not have a claim under the Fifth Amendment of the Constitution of the United States and has not shown the existence of any special or important reason for the granting of a Writ of Certiorari in this case.

STATEMENT OF THE CASE

Central Illinois Public Service Company (Central Illinois) is a corporation organized and existing under the Business

Corporation Act of the State of Illinois (Ill. Rev. Stat. 1975, Ch. 32, §§ 157.1-157.167) and is a public utility as defined by the Illinois Act entitled, "An Act concerning public utilities," approved June 29, 1921, as amended (Ill. Rev. Stat. 1975, ch. 111⅔, § 10.3). It was authorized by appropriate orders of the Illinois Commerce Commission (Ill. Rev. Stat. 1975, ch. 111⅔, §§ 50, 56, 63) to acquire by eminent domain an easement for the 138 KV multigrounded transmission line upon and across Petitioner's property. On June 29, 1972, pursuant to Section 2 of the Illinois Eminent Domain Act entitled, "An Act to provide for the exercise of the right of eminent domain," approved April 10, 1972 (Ill. Rev. Stat. 1975, Ch. 47, § 2), Central Illinois filed a petition in the Circuit Court of McDonough County, Illinois, to acquire by eminent domain an easement over 13 parcels of real estate including a parcel owned by Petitioner for the construction, operation and maintenance of a 138 KV multigrounded transmission line.

The case has been tried twice. Only two of the parcels, Petitioner's and one other were involved in the trials of the case. The first trial was held in December of 1972, in which judgment on the verdict was entered for Petitioner on December 21, 1972, for $8,190.70. A motion for a new trial was filed on January 18, 1973. The motion for a new trial was not granted by the Trial Court until January 29, 1974, more than one year later.

The alleged improper argument complained of by Petitioner set forth as Appendix "J" to the petition was acted upon by the Trial Court during the progress of the trial, Appendix "1". The alleged improper evidence was the testimony of Mr. Bruegge that the presence of a power line upon a 120 acre tract in DeWitt County did not affect the sale of that property. This testimony was offered and received without objection, Appendix "2". The comments of the Trial Court, Appendix "K" to

the petition, were prompted by an Affidavit of Joe Bianucci that a residence valued at $15,000 was located on the 120 acre tract in DeWitt County and ignored entirely the Affidavit of Frank A. Lamar, the purchaser of the 120 acre DeWitt County tract, that the power line did not in any way reduce the amount of his bid, Lamar Affidavit Appendix "3".

The second trial lasted from April 29, 1974, to and including May 4, 1974, and resulted in a verdict on the date last mentioned in favor of Petitioner in the amount of $12,536.60.

ARGUMENT

I

Attorneys' Fees Are Not Embraced Within Just Compensation in an Eminent Domain Proceeding.

This Court in *Dohany v. Rogers*, 281 U.S. 362, 368, 50 S. Ct. 299, 302, 74 L. ed 904, 911 (1929), held that

> "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."

The constitutional requirement of just compensation for the taking of land by eminent domain does not include attorneys' fees and expenses. *United States of America v. 4.18 acres of land, more or less, situate in Idaho County, State of Idaho and Scott Standard Harris, et al.*, U.S. Court of Appeals Ninth Circuit, 542 F. 2d 786, 788 (1976); *United States v. 2,353.28 acres of land, more or less, situate in the Counties of Brevard and Volusia, State of Florida, and Lucille M. Bair, et al.*, U.S. Court of Appeals Fifth Circuit, 414 F. 2d 965, 972 (1969); *In re Clark Estate. Brunstetter v. City of Miami*, U.S. Court of Appeals Fifth Circuit, 187 F. 2d 1003, 1005 (1951); *United States v. 15.3 acres of land, more or less, situate in the City of Scranton, County of Lackawanna and Commonwealth of Pennsylvania and Delaware Lackawanna and Western Railroad Co. et al.*, U.S. District Court M.D. Pennsylvania, 158 F. Supp. 122, 125 (1957); *United States of America v. 23.94 acres of land, more or less, situate in Floyd County, Commonwealth of Virginia and Foster E. Dalton, et al.*, U.S. District Court W.D. Virginia, 325 F. Supp. 330, 332 (1970); *United States v. 254.35 acres of land in Caddo Parrish Louisiana, et al.*, U.S. District Court W.D. Louisiana, 46 F. Supp. 913, 914 (1942).

The cases, *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 43 S. Ct. 354, 17 L. ed 664 and *United States v. Klamath & M. Tribes*, 304 U.S. 119, 58 S. Ct. 799, 82 L. ed 1219 (1938), cited by Petitioner, Page 8 of Petition, deal with the question whether interest under certain circumstances is includable as just compensation, and such cases are not applicable in this case. The Florida Supreme Court case, *Jacksonville Expressway Authority v. Henry G. DuPree Company*, 108 So. 2d 289, 294 (1959), cited by Petitioner, Page 10 of Petition, is not applicable in this case.

II

Illinois Law Does Not Authorize an Allowance for Attorneys' Fees in a Case Such as the One for Which a Writ of Certiorari Is Here Sought.

Central Illinois did not dismiss the petition or fail to make payment of full compensation within the time named in the Judgment Order. Also there has not been any final judgment that Central Illinois cannot acquire the property in question by condemnation. The relevant part of Section 10 of the Illinois Eminent Domain Act is as follows:

> "* * * If in such case the petitioner shall dismiss said petition before the entry of the order by the court first mentioned in this paragraph (a) or shall fail to make payment of full compensation within the time named in such order, or if the final judgment is that the petitioner cannot acquire the property by condemnation, such court or judge shall, upon application of the defendants to said petition or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition, as upon the hearing of such

application shall be right and just, and also for the payment of the taxable costs." (*Ill. Rev. Stat. 1975*, Ch. 47, § 10)

The rule in Illinois is that Attorneys' fees are not allowable to the successful party in the absence of a statute or in the absence of some agreement or stipulation especially authorizing the allowance thereof. In the case of *Ritter v. Ritter*, 381 Ill. 549, 553, 46 N.E. 2d 41, 43 (1943), the Supreme Court of Illinois stated:

> "The rule is also well established that attorney fees and the ordinary expenses and burdens of litigation are not allowable to the successful party in the absence of a statute, or in the absence of some agreement or stipulation specially authorizing the allowance thereof, and this rule applies equally in courts of law and in courts of equity. (*Constant v. Matteson*, supra; *Conwell v. McCowan*, supra; *Hutchison v. Hutchison*, supra; *Rasch v. Rasch*, 278 Ill. 261; *Kinane v. Fay*, 168 Atl. (N.J.) 724; *Weinhagen v. Hayes*, 190 N.W. (Wis.) 1002; *Day v. Woodworth*, 14 L. ed. 181.) Our statutes authorize the taxation of solicitor's fees as costs in partition cases but prior to the act authorizing it, the law was that they could not be so taxed. *Wilhite v. Pearce*, 47 Ill. 413; *Eimer v. Eimer*, id. 373; *Strawn v. Strawn*, 46 Ill. 412; *Campbell v. Campbell*, 63 id. 502."

In the case of *Trustees of Schools v. Schroeder*, 8 Ill. App. 3d 122, 125, 289 N.E. 2d 247, 250 (1972), the Appellate Court First District said:

> "* * * It does not support the proposition that in a suit to enjoin vexatious and harassing litigation, expenses, including attorneys' fees, can be recovered as elements of damages. This is so because under Illinois law, apart from sums allowable and taxed as costs, the expenses of trial preparation of litigation or expenditures for counsel fees, cannot

> be recovered as damages. (*Chicago Coliseum Club v. Dempsey*, 265 Ill. App. 542; *Boss v. Coe Investment Co.*, 45 Ill. App. 2d 417, 195 N.E. 2d 735; I.L.P. Damages, Section 62.) The assessing of attorneys' fees against the losing party in a litigation rests wholly on statutory or contractual authority. (*Ritter v. Ritter*, 381 Ill. 549, 553, 46 N.E. 2d 41.) In this State, there is no common law or equitable principle that allows attorneys' fees either as costs or as damages. (*People ex rel. Henderson v. Redfern*, 104 Ill. App. 2d 132, 243 N.E. 2d 252; *House of Vision, Inc. v. Hiyane*, 42 Ill. 2d 45, 245 N.E. 2d 468.) * * *"

In *Central Illinois Public Service Company v. Lawrence T. Westervelt*, Appendix "C", petition, the Appellate Court Third District of Illinois, 35 Ill. App. 3d 777, 782, 342 N.E. 2d 463, 468 (1976) stated:

> "We find no merit in defendant's claim for attorney fees for the first trial because a mistrial was granted. Defendant does not fall within the applicable statutory provisions for attorney fees in an eminent domain action, see Ill. Rev. Stat. 1973, ch. 47 § 10. Likewise, no agreement or stipulation between Westervelt and CIPS on which to base allowance of attorney fees to Westervelt has been shown."

In *Central Illinois Public Service Company v. Lawrence T. Westervelt*, Appendix "A", petition, the Supreme Court of Illinois 67 Ill. 2d 207, 213, 367 N.E. 2d 661, 663 (1977) said:

> "We find further that the appellate court correctly concluded that the defendant is not entitled to attorney fees because he did not fall under the provisions for attorney fees in an eminent domain action. Ill. Rev. Stat. 1973, ch. 47, par. 10."

III

The Constitutional Provisions With Respect to Just Compensation of the 1970 Constitution of Illinois and the Fifth Amendment of the U.S. Constitution Are Substantially the Same.

Section 2 of Article I of the 1970 Constitution of Illinois

> "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the law."

and Section 15 of said Article

> "Private property shall not be taken or damaged for public use without just compensation as provided by law * * *"

and the Fifth Amendment of the Constitution of the United States states that

> "No person shall * * * nor be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation."

CONCLUSION

For the reasons given we respectfully submit that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

APPENDIX "1"

Action by the Trial Court on Alleged Improper Argument

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THE COURT: Mr. Nafziger, I am not going to allow you to talk about hundreds of roads, and I heard no testimony throughout this trial; and you are talking about stations some place else that have nothing to do with this matter. I am not going to allow you to talk on that subject. You could extend it to Death Valley and South America, too, I suppose. It is not within the area of the trial. I think the jury is aware anyway, but let's keep it within the limit.

APPENDIX "2"

Excerpt of Bruegge Testimony

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Q. What investigation did you make, if any, to determine whether or not the existence of that power line upon the 120 acres affected the sale price of the property?

A. In my opinion it didn't.

Q. What investigation did you make to determine that fact?

A. This farm was divided and sold in three tracts, and the other two tracts did not have a power line on it, and the other two sold for the same per acre value as the 120.

Cross-Examination of Mr. Bruegge

By Mr. Stan Tucker

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Q. Mr. Bruegge, you referred to some land over at DeWitt County near Clinton, Illinois?

A. Yes, sir.

Q. Isn't it true that the land at DeWitt County is flat, prairie land, very good farm land?

A. Good agricultural land.

Q. Isn't it very flat, prairie land?

A. Flat.

Q. Drummer Flanagan soil for the most part?

A. That's right.

Q. Would you say that Clinton, Illinois, is similar in its characteristics to Macomb, Illinois?

A. As far as topography of the land?

Q. No, I mean the City of Clinton.

A. I don't quite understand your question.

Q. What do you know about the City of Clinton?

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A. It is the county seat of DeWitt County.

Q. What else do you know?

A. What am I supposed to know about it, Mr. Tucker?

Q. Let me ask you, do you know the population?

A. Yes, sir.

Q. What is it?

A. Around 7,500.

Q. That's substantially smaller than Macomb?

A. Yes, sir.

Q. Do you know whether or not there is a college or university there?

A. No, there isn't.

Q. You don't know, or there isn't?

A. There isn't.

Q. There is not. When you go north out of Clinton on the highway there, and you pass the DeWitt County historical building, and you go north, what is the next town you go to?

A. Wapella.

Q. About how far is Wapella?

A. I would have to say four to five miles. I really don't know right off hand.

Q. That's right, it is about four to five miles, and the property is four to five miles northwest. Now Hayworth would be next up the road north, and that would be about 11 miles?

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A. I would imagine so.

Q. I beg your pardon?

A. I would imagine so, yes, sir.

Q. And the property you are referring to would probably be west of Wapella out in the country there, right?

A. About a mile and a half west of Wapella.

Q. Wapella is a very small place, isn't it?

A. That's correct.

Q. You have testified that you were experienced in appraising, and that you were familiar here, of course, earlier I believe you testified that you had never appraised in McDonough County before. Let me ask you with regard to the Westervelt property, you didn't know what the number of staff there were at Western Illinois University, did you?

A. The number of staff, personnel?

Q. Yes.

A. No, sir, I do not.

Q. And as I recall, you also didn't know that Professor Fox had purchased two tracts of four acres each from Mr. Westervelt for $1,500 an acre. In fact, I believe you stated that you thought they were for $750 an acre, isn't that right?

A. Yes, but I really didn't need anything that size, because my properties weren't in that size category.

Q. You checked that sale, didn't you?

A. I looked it up is all.

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Q. You looked it up and made a mistake, and as my final question, I would like to ask you if you were as careful in checking the sales you referred to about properties where power lines were as you were careful in checking this Fox sale?

A. More so, sir.

MR. TUCKER: Thank you, Mr. Bruegge.

APPENDIX "3"

Affidavit of Frank A. Lamar

C-156-157

State of Illinois }
County of DeWitt } ss.

FRANK A. LAMAR, being first duly sworn, deposes and says that he is a resident of the State and County aforesaid.

Affiant further deposes and says that:

1. He was a relative of Leo N. O'Dea who died March 15, 1972;

2. Leo N. O'Dea, at the time of his death, was the owner of three parcels of real estate consisting of a 40 acre tract, hereinafter referred to as Tract "A", a 120 acre Tract, hereinafter referred to as Tract "B" and a 40 acre Tract, hereinafter referred to as Tract "C";

3. Tract "A" is the Southeast Quarter of the Southeast Quarter of Section Six (6), Township Twenty (20) North, Range Two (2) East of the Third Principal Meridian, DeWitt County, Illinois; Tract "B" is a 120 acre tract being the West 120 acres of the Northwest Quarter of Section Eight (8), Township Twenty (20) North, Range Two (2) East of the Third Principal Meridian, DeWitt County, Illinois, and Tract "C" is the Southeast Quarter of the Southwest Quarter of Section Eight (8), Township Twenty (20) North, Range Two (2) East of the Third Principal Meridian, DeWitt County, Illinois;

4. Tracts "A", "B" and "C" were sold at public sale by the Administrators of the estate of Leo N. O'Dea on October 21, 1972;

5. Tract "A" was purchased at said sale by Charles J. and Doris E. Finfrock for $39,298.50 or approximately $982.46 per acre; there were not transmission line towers or improvements on Tract "A"; subsequent to said sale, Charles J. and Doris E. Finfrock conveyed Tract "A" to their son, James Lee Finfrock by deed dated February 22, 1973;

6. Tract "B" was purchased at said sale by Affiant; there was an electric transmission line supported by three 4-legged steel towers upon said Tract "B" at the time of the purchase of Tract "B" by Affiant; the transmission line came to within approximately 500 feet of the residence on Tract "B" and is still in operation; Affiant purchased Tract "B" at said sale for $123,-300 or approximately $1,027.50 per acre: Affiant stated that the presence of the transmission line and towers did not in any way reduce the amount of his bid and he would have paid no more per acre for Tract "B" if there had been no electric transmission line and no steel towers upon Tract "B"; there were two other bidders who bid on Tract "B" at the time of the sale;

7. Ivan A. Lamar was the purchaser at the sale of Tract "C"; he paid $40,600, or $1,015 per acre for Tract "C"; there were no electric transmission lines, steel towers or other improvements on Tract "A".

Further Affiant sayeth not.

s/ Frank A. Lamar

Subscribed and sworn to before me this 24th day of January, 1974.

s/ Fred W. McMillan
Notary Public